

~~CONFIDENTIAL~~

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

11	WILLIE RICHARDSON, III,)	No. C 04-2712 RMW (PR)
12	Petitioner,)	
13	vs.)	ORDER GRANTING
14	BEN CURRY, Warden,)	RESPONDENT'S MOTION TO
15	Respondent.)	DISMISS; DENYING
)	CERTIFICATE OF
)	APPEALABILITY
)	(Docket No. 62.)

Petitioner, a California prisoner proceeding pro se, filed a second amended petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On July 23, 2014, respondent filed a motion to dismiss the second amended petition as untimely, or in the alternative, to dismiss the claims as procedurally barred. Although given an opportunity, petitioner has not filed an opposition. After careful consideration of the pleadings, the court GRANTS respondent's motion to dismiss the petition based on respondent's argument that the claims are procedurally barred.

PROCEDURAL HISTORY

Petitioner has had a long history with this court. He filed this action on July 8, 2004. On September 30, 2005, the court granted respondent's motion to dismiss the petition for failure to exhaust, and directed petitioner to file an amended petition within thirty days. (Docket No. 13.) Petitioner then filed an amended petition on November 2, 2005. (Docket No. 14.) Along with the amended petition, petitioner requested a stay and abeyance so that he could return to the state

1 court to exhaust unexhausted claims. On September 27, 2006, the court denied petitioner's
2 motion to stay as moot because petitioner's claims appeared to be fully exhausted, and granted
3 petitioner an extension of time to file a second amended petition. (Docket No. 25.)

4 On December 29, 2006, petitioner filed a second amended petition. (Docket No. 30.) On
5 May 22, 2007, the court issued an order to show cause why the second amended petition should
6 not be granted. On July 23, 2007, respondent filed a motion to dismiss the second amended
7 petition as untimely, procedurally barred, or unexhausted. On March 31, 2008, the court granted
8 in part respondent's motion to dismiss and directed petitioner to elect how he would like to
9 proceed. (Docket No. 41.) Petitioner requested the court stay and hold the case in abeyance, and
10 on August 12, 2008, the court granted petitioner's motion. (Docket No. 47.)

11 Thereafter, on April 8, 2014, the court granted petitioner's motion to lift the stay.
12 However, the court noted that petitioner otherwise failed to comply with the court's August 12,
13 2008 order informing petitioner that, in order for the court to consider any of petitioner's then
14 unexhausted claims, petitioner must properly present those claims to the California Supreme
15 Court within thirty days, and within thirty days of the California Supreme Court's decision, file
16 an amended petition in this court setting forth his newly exhausted claims. Because petitioner
17 failed to do so, the court dismissed petitioner's unexhausted claims, and ordered that the case
18 proceed only with the exhausted claims, as presented in petitioner's second amended petition.

19 Thus, as grounds for federal habeas relief, petitioner's surviving claims are: (1) he was
20 denied his right to due process because his current crimes of conviction are based upon the
21 insufficient evidence of the uncorroborated testimony of accomplice Niyah Edwards, and (2)
22 there was insufficient evidence to support his convictions.

23 Respondent has now filed a motion to dismiss as untimely, or in the alternative, as
24 procedurally barred. Because the court agrees that the claims are procedurally barred, it will not
25 address respondent's initial argument that the claims are untimely.

26 ANALYSIS

27 Respondent argues that petitioner's federal petition is procedurally barred because the
28

1 California Supreme Court denied petitioner's federal claims with a citation to, inter alia, In re
 2 Lindley, 29 Cal. 2d 109 (1947). Petitioner's petition raises two claims: (1) petitioner was
 3 denied his right to due process because his current crimes of conviction are based upon the
 4 insufficient evidence of the uncorroborated testimony of accomplice Niyah Edwards, and (2)
 5 there was insufficient evidence to support his convictions.

6 "[F]ederal habeas courts generally may not review a state court's denial of a state
 7 prisoner's federal constitutional claim if the state court's decision rests on a state procedural rule
 8 that is independent of the federal question and adequate." Coleman v. Thompson, 501 U.S. 722,
 9 722-23 (1991). The procedural default doctrine bars federal habeas review "unless the petitioner
 10 can demonstrate cause for the default and actual prejudice as a result of the alleged violation of
 11 federal law, or demonstrate that failure to consider the claims will result in a fundamental
 12 miscarriage of justice." Id. at 724.

13 In petitioner's first state habeas petition to the Superior Court, petitioner raised his two
 14 federal claims, as well as a claim of ineffective assistance of counsel.¹ (Resp. MTD, Ex. 5.) The
 15 Superior Court issued an order denying the petition. (Id., Ex. 6.) In the order, the Superior
 16 Court stated:

17 II. Contentions in the Petition

18 Petitioner raises four claims of error. First, there is insufficient evidence
 19 to corroborate the testimony of Edwards pursuant to PC 1111, violating due
 20 process (14th Amendment). Second, there is insufficient evidence to sustain a
 21 conviction of attempted murder and personal use of a firearm. Third, there is
 22 insufficient evidence to sustain the conviction for kidnaping. And fourth,
 23 petitioner did not receive effective assistance of counsel in violation of the 6th
 24 Amendment.

22 III. Discussion

23 The court has carefully read the within cause and now denies same for
 24 the following reasons. First, habeas corpus cannot be used to review the

25
 26 ¹ In the state habeas petition, petitioner separated his insufficiency of the evidence claims
 27 into three claims: (1) insufficient evidence based on the uncorroborated testimony; (2)
 28 insufficient evidence to sustain his conviction of attempted murder and personal use of a firearm;
 and (3) insufficient evidence to sustain the kidnaping conviction. Petitioner's two claims in the
 underlying federal petition combine the latter two insufficiency claims into one.

1 sufficiency of the evidence. Thus, the first three contentions set forth above
 2 should have been raised – if at all – on appeal, but were not. Second,
 3 contentions which could have been raised on appeal but were not cannot be
 4 renewed in a petition for habeas corpus because habeas corpus cannot serve as a
 5 second appeal or a substitute for appeal. (In re Waltreus (1965) 62 Cal.2d 218,
 6 225.)

7 (Id., Ex. 6 at 2.)

8 Petitioner then filed in substance the exact same petition to the California Supreme
 9 Court. (Id., Ex. 7.) The California Supreme Court issued a summary denial, citing to In re
 10 Lindley, 29 Cal. 2d 109 (1947), In re Dixon, 41 Cal.2d 756 (1953), In re Swain, 34 Cal. 2d 300
 11 (1949), and People v. Duvall, 9 Cal. 4th 464 (1995). The California Supreme Court did not,
 12 however, specify which citation applied to which claims.

13 In re Lindley, 29 Cal. 2d 109 (1947) and In re Dixon, 41 Cal.2d 756 (1953) are both
 14 adequate and independent state grounds that bar federal review. See Carter v. Giurbino, 385
 15 F.3d 1194, 1198 (9th Cir. 2004) (concluding that In re Lindley is an independent and adequate
 16 state ground); Jackson v. Roe, 425 F.3d 654, 657 n.2 (9th Cir. 2005) (“Dixon sets forth a
 17 procedural bar whereby a petitioner is precluded from raising on habeas issues that could have
 18 been, but were not, raised on direct appeal.”). On the other hand, In re Swain, 34 Cal. 2d 300
 19 (1949) and People v. Duvall, 9 Cal. 4th 464 (1995) do not necessarily bar federal review. See
 20 Cross v. Sisto, 676 F.3d 1172, 1178 (9th Cir. 2012) (reaffirming that a citation to Swain and
 21 Duvall means that the petitioner has not pled his claims with sufficient particularity). Thus,
 22 without more, the California Supreme Court’s summary denial is ambiguous.

23 In general, an ambiguous order cannot preclude federal collateral review. See Calderon
 24 v. United States Dist. Court (Bean), 96 F.3d 1126, 1131 (9th Cir. 1996) (California Supreme
 25 Court order that did not specify which of 39 claims was barred by which of several state rules
 26 considered ambiguous and therefore insufficient to preclude federal collateral review).
 27 However, case law instructs that federal courts must “ascertain for themselves if the petitioner
 28 is in custody pursuant to a state court judgment that rests on independent and adequate state
 grounds.” Koerner v. Grigas, 328 F.3d 1029, 1052 (9th Cir. 2003). “But if it is impossible for
 the federal court to ascertain whether such grounds have been relied upon, the state court

1 file.

2 For the reasons set out in the discussion above, petitioner has not shown “that jurists of
3 reason would find it debatable whether the petition states a valid claim of the denial of a
4 constitutional right [or] that jurists of reason would find it debatable whether the district court
5 was correct in its procedural ruling.” Slack v. McDaniel, 529 U.S. 473, 484 (2000).
6 Accordingly, a certificate of appealability is DENIED.

7 IT IS SO ORDERED.

8 DATED: ~~HFFD~~ _____


RONALD M. WHYTE
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

RICHARDSON,

Plaintiff,

v.

BEN CURRY,

Defendant.

Case Number: CV04-02712 RMW

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on March 11, 2015, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Willie Richardson T-03382
5-N-34
C.S.P. San Quentin
San Quentin, CA 94974

Dated: March 11, 2015

Richard W. Wieking, Clerk
By: Jackie Lynn Garcia, Deputy Clerk